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12 UNITED STATES DISTRICT COURT FOR THE
13 EASTERN DISTRICT OF WASHINGTON

15 ERIC WRIGHT, INDIVIDUALLY
16 AND IN HIS CAPACITY AS
17 PERSONAL REPRESENTATIVE OF
18 THE ESTATE OF STEVEN O.
19 WRIGHT; AND, AMY SHARP,
INDIVIDUALLY,

Plaintiff,

20 v.

21 THE UNITED STATES OF
22 AMERICA D.B.A. THE
23 DEPARTMENT OF VETERANS
24 AFFAIRS; and DOES 1-20, Inclusive,

25 Defendants.

No. 2:15-cv-00305-TOR

**PLAINTIFFS' MOTION
AND MEMORANDUM
OF AUTHORITIES IN
SUPPORT OF MOTION
OF LEAVE OF COURT
TO FILE AMENDED
COMPLAINT FOR
DAMAGES**

**NOTE ON MOTION
CALENDAR:
6/16/16
WITH ORAL
ARGUMENT – 10:30AM
Ph:1-888-273-3658**

1 Plaintiffs, by and through their undersigned attorneys, hereby move the Court
2 for an order allowing them leave to file an Amended Complaint for Damages. This
3 motion is made pursuant to Fed.R.Civ.P. 15(a) and is based upon the records and files
4 herein as well as the Declaration of Richard C. Eymann filed herewith. A [proposed]
5 Order Granting Plaintiffs' Motion for Leave to File Amended Complaint for Damages
6 is attached hereto as Exhibit A.
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8 **I. BACKGROUND**

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10 This lawsuit arises out of allegations of the wrongful death of Eric Wright. Mr.
11 Wright was being treated at Department of Veterans Affairs' Spokane Veterans
12 Administration Medical Center for knee pain. The Veteran's Hospital was aware that
13 Mr. Wright was a fall risk, and had actual or constructive knowledge of the defects in
14 the Veteran's Hospital premises. And while leaving Mr. Wright the hospital on
15 crutches and unassisted by any employees, Mr. Wright fell and hit his head on a steel
16 rack and/or the pavement on the hospital premises. Mr. Wright was then reassessed in
17 the emergency room and discharged. Mr. Wright died in his home a few hours after
18 being discharged due to a brain hemorrhage.
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22 The plaintiffs' original complaint was filed on November 3, 2015 and alleged,
23 among other things, wrongful death, negligence, medical malpractice and an inference
24 of negligence regarding the circumstances of Mr. Wright's fall. It listed non-physician
25 employees working at the Veterans Hospital as parties to the complaint. Defendant
26 United States' moved for dismissal based on lack of subject matter jurisdiction. Prior
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1 to responding to the United States motion to dismiss, on April 26, 2016, plaintiffs'
2 contacted counsel for the United States requesting a stipulation to amend the original
3 complaint, which counsel for the United States has not approved.
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5 Plaintiffs responded to the United States' motion to dismiss to clarify that the
6 claims for damages against the United States are not limited to the actions of the
7 individually named doctors and include claims for premise liability and negligent acts
8 of non-physician employees of the Veteran's Hospital. Plaintiffs' response was also
9 intended to clarify that doctrine of *res ipsa loquitor* is an inference of negligence,
10 which was stated as a claim in the original complaint, and the doctrine of *res ipsa*
11 *loquitor* can be used to infer negligence for premise liability and medical negligence
12 claims. The United States' Reply indicates that there is still a misunderstanding as to
13 how the doctrine of *res ipsa loquitor* is to be applied and that all claims the Plaintiffs'
14 are making against the United States should be dismissed. Thus, plaintiffs', in an
15 abundance of caution, seek leave from the Court to amend their original complaint.
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19 **II. RELIEF REQUESTED**

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21 The purpose of the amending the original complaint is twofold: First, plaintiffs
22 seek to correct the employment status of the individually named physicians. Since
23 filing the original complaint, it has been represented that Defendants Medford
24 Cashion, M.D. and Shea McManus, M.D. were independent contractors of Veteran
25 Affairs, not agents or employees. Second, plaintiffs seek to amend the complaint for
26 the convenience of all defendants in understanding the claims that the plaintiffs are
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1 asserting against each defendant. Plaintiffs want to make clear that they are claiming
2 negligence against the United States for premise liability and medical negligence, both
3 which could be established through an inference of negligence, and these claims are
4 not limited to the claims against other individually named defendants.
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6 **III. POINTS AND AUTHORITIES**

7 Fed.R.Civ.P. 15(a) provides:
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9 A party may amend the party's pleading once as a matter of
10 course at any time before a responsive pleading is served
11 or, if the pleading is one to which no responsive pleading is
12 permitted and the action has not been placed upon the trial
13 calendar, the party may so amend it at any time within 20
14 days after it is served. Otherwise a party may amend the
15 party's pleading only by leave of court or by written
16 consent of the adverse party; and leave shall be freely given
17 when justice so requires. A party shall plead in response to
an amended pleading within the time remaining for
response to the original pleading or within 10 days after
service of the amended pleading, whichever period may be
the longer, unless the court otherwise orders.

18 Fed.R.Civ.P. 15(a) specifically provides that leave shall be freely given when
19 justice so requires. Thus, courts have ruled that Fed.R.Civ.P. 15(a) is to be liberally
20 applied. *Eminence Capital, LLC v. Aspen, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).
21 In this regard, courts have held that the “purpose of pleading is to facilitate a proper
22 decision on the merits[,]” and not to erect formal and burdensome impediments to the
23 litigation process. *Forman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v.*
24 *Gibson*, 355 U.S. 41, 48 (1957)).
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27 In *Forman*, the Supreme Court set-forth several factors a district court ought to
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1 consider when determining whether to grant leave to amend:

2 In the absence of any apparent or declared reason —such as
3 undue delay, bad faith or dilatory motive on the part of the
4 movant, repeated failure to cure deficiencies by
5 amendments previously allowed, undue prejudice to the
6 opposing party by virtue of allowance of the amendment,
7 futility of amendment, etc. — the leave sought should, as
8 the rules require, be “freely given.”

9 371 U.S. at 182.

10 The “touchstone of the inquiry under rule 15(a)” is the resulting prejudice to the
11 non-moving party. *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 368
12 (5th Cir. 2001); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (stating
13 that “the crucial factor is the resulting prejudice to the opposing party”).

14 The Court’s Scheduling Conference provides a deadline to amend or add named
15 parties on or before September 30, 2016. No prejudice will attend this Court’s order
16 granting plaintiffs’ motion. Further, none of the *Forman* factors articulated above are
17 present. Accordingly, defendants can show no actual prejudice by allowing an
18 Amended Complaint for Damages to be filed and “the leave sought should, as the
19 rules require, be ‘freely given.’” *Forman*, 371 U.S. at 182. The proposed Amended
20 Complaint for Damages is attached as Exhibit A to the Declaration of Richard C.
21 Eymann filed herewith.

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IV. CONCLUSION

In view of the liberal construction of Fed.R.Civ.P. 15(a) and the lack of prejudice to defendants, plaintiffs respectfully request that the Court grant their Motion for Leave of Court to File Amended Complaint for Damages.

DATED this 13th day of May, 2016.

EYMANN ALLISON HUNTER JONES P.S.

s/ Richard C. Eymann

RICHARD C. EYMANN, WSBA #7470
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

1 I hereby certify that on May 13, 2016, I electronically filed the foregoing with
2 the Clerk of the Court using the CM/ECF system which will send notification of such
3 filing to the following participants:

4 Rudy J. Verschoor Rudy.J.Verschoor@usdoj.gov

5 Elizabeth L. McAmis Elizabeth@favros.com

6 Ketia B. Wick ketia@jgkmw.com

7 Karin J. Mitchell Karen@jgkmw.com

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9
10
11 s/Richard C. Eymann
12 RICHARD C. EYMANN